

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY EUGENE SAFFOLD,

Petitioner,

No. CIV S-98-1040 DFL JFM P

vs.

JIM HAMLETT, Warden, et al.,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding with counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his April 3, 1990, conviction on charges of first-degree murder, CAL. PENAL CODE § 187, assault with a deadly weapon, CAL. PENAL CODE § 245(a)(2), two counts of robbery, CAL. PENAL CODE § 211, and findings of firearms use associated with the murder and robberies, CAL. PENAL CODE § 12022.5. As a result of his conviction on all counts, the trial court sentenced petitioner on July 2, 1990, to three years on one of the robberies, with a concurrent middle term of three years for assault with a deadly weapon, and a consecutive indeterminate term of 25 years to life for the first-degree murder. The court set the sentence for the other robbery at the middle term of three years and stayed the sentence, along with the firearms enhancement on the two robberies. The court also imposed a two year enhancement associated with the murder.<sup>1</sup>

<sup>1</sup> Upon direct appeal, the California Court of Appeal for the Third Appellate District modified the sentence by staying the sentence for assault with a deadly weapon.

Petitioner raises two claims in his petition, filed June 4, 1998, that his prison sentence violates the Constitution.<sup>2</sup> In both claims, petitioner alleges ineffective assistance of trial counsel.<sup>3</sup> In the first claim, petitioner argues that his trial counsel failed to properly impeach with two sets of out of court statements the credibility of the eyewitness to the murder. In the second claim, petitioner states that his counsel failed to properly litigate a motion to suppress the eyewitness's identification of petitioner.

Respondent filed his answer on October 27, 2004.<sup>4</sup>

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<sup>2</sup> Petitioner's original petition filed on June 4, 1998, contained five claims. After significant litigation on the issue of procedural default, petitioner filed a supplemental memorandum of points and authorities on August 9, 2004. In that supplemental memorandum, petitioner abandoned claims three through five.

<sup>3</sup> Petitioner was represented by multiple defense counsel. Patricia Ferguson represented petitioner during the preliminary hearing. At trial, Ralph Cingcon and Michael Platt were petitioner's trial counsel. While Mr. Platt filed the motion to exclude Ms. Michel's identification that is at issue in petitioner's second claim, Mr. Cingcon argued the motion and did most of the oral advocacy in this case, including cross-examination of the witnesses during trial. In order to avoid confusion, the court has chosen to address all counsel in the singular. Where necessary, reference to particular counsel has been made.

<sup>4</sup> Following their answer, respondent filed a renewed motion to dismiss on April 13, 2006. Petitioner replied on August 17, 2006, with surreply following on September 9, 2006. Respondent argues in their renewed motion that petitioner's writ was not properly filed because he delayed nearly five years before filing his state petition. While respondent's position appears to have some merit in light of the decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) and the subsequent Ninth Circuit ruling in *Bonner v. Carey*, 425 F.3d 1145 (9th Cir. 2005), the court makes no findings and recommendations with regards to that procedural issue.

Although the question of procedural default and other general prerequisites for federal habeas corpus which are unrelated to the merits of the particular claims "should ordinarily be considered first," a reviewing court need not do so "invariably," especially when those issues turn on difficult questions of state law. *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) (court bypassed question of procedural default to reach the merits of petitioner's claims); *see also* *Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004) (same); *Carr v. Cigna Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996) (court choosing to bypass statute of limitations issues to reach the merits of the claims before it). In order to resolve whether the instant petition is time-barred, the court would be required to address complicated and novel issues with regard to the applicability of *Pace* to California's timeliness rules. In this case, the court finds that petitioner's claims can be resolved more easily by addressing them on the merits. Accordingly, without deciding the issue, the court will assume for the sake of these findings and recommendations that petitioner's claims are not time-barred.

FACTS<sup>5</sup>

Shortly after 7:00 a.m., on September 29, 1986, Saffold and Rodney Reece drove to the El Mexicano Restaurant. The owners, Augustin and Maria Michel, had arrived at 6:30 a.m. and opened at 7:00 a.m.

Saffold entered the restaurant, retrieved a beer from a cooler, then approached the cash register. When Saffold arrived at the cash register, Mr. Michel was already there. Saffold aimed a gun at Mr. Michel and said, in English, "Give me the money, give me the money." Mr. Michel raised his arms and said, in Spanish, "Which money? What money?" Saffold fired the gun, hitting Mr. Michel on the right side of the neck. He fired a second shot which was later recovered in the kitchen.

Mrs. Michel, who from the kitchen area saw the two at the cash register and saw Saffold shoot Mr. Michel, moved back to the sink in the kitchen. Mr. Michel entered the kitchen and "threw himself on the floor." He said to Mrs. Michel, "Get down, they're going to kill you." She squatted down, but Saffold said to her, "Give me the money, give me the money." At gunpoint, she went to the cash register and put it in a bag. Saffold took the food stamps from the register and put them in the bag. He then ran out of the restaurant. Mr. Michel died from the gunshot wound.

Saffold testified in his own defense claiming he went to the El Mexicano Restaurant on the morning of September 29, 1986, and bought a beer and two burritos, but did not commit the crimes.

(People v. Saffold, slip op. at 2-3).

## ANALYSIS

I. Standards for a Writ of Habeas Corpus

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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<sup>5</sup> The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v. Saffold, No.# C009223 (January 27, 1992) (hereinafter Opinion), a copy of which is attached as Exhibit D to Respondent's Answer to Petitioner's Application for Writ of Habeas Corpus, filed August 9, 2004.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is “contrary to” clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at different result. Early v. Packer, 537 U.S. 3, 7 (2002) (citing Williams v. Taylor, 529 U.S. 362, 405-406 (2000)).

Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s case. Williams, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 412; see also Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175 (2003) (it is “not enough that a federal habeas court, in its independent review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

## II. Petitioner’s Claims

### A. Claim of Ineffective Impeachment of Eyewitness Testimony with Prior Inconsistent Statements.

Petitioner’s first claim is that his trial counsel provided ineffective assistance. Petitioner claims his trial counsel committed prejudicial error when he failed to effectively cross-examine Ms. Michel, the key prosecution witness. According to petitioner, trial counsel’s failure

1 to impeach Ms. Michel with her prior inconsistent statements about the identity of the murderer  
2 cast significant doubt upon the jury's verdict and require granting of the writ.

3           There was no reasoned rejection of this ineffective assistance claim by the state  
4 courts. Rather, upon presentment of this particular claim by petitioner, the California Supreme  
5 Court issued a "post-card" denial, stating simply that the "petition for writ of habeas corpus is  
6 denied." (Resp't's Answer to Writ of Habeas Corpus, filed October 27, 2004, Appendix F  
7 [hereinafter "Answer"].) Such a terse "post-card" denial is an adjudication on the merits. Gaston  
8 v. Palmer, 417 F.3d 1030, 1038 (9th Cir. 2005); Luna v. Cambra, 306 F.3d 954, 960 (9th Cir.  
9 2002), mandate recalled and reissued as amended by 311 F.3d 928 (9th Cir. 2002); Hunter v.  
10 Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993). There is  
11 nothing in the record that indicates that the denial was procedural or not on the merits of  
12 petitioner's claim. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). This court is obligated to  
13 apply AEDPA standards as a result of the fact that there has been an adjudication on the merits,  
14 28 U.S.C. § 2254(d); however, given the lack of reasoning provided in the previous denials, it  
15 must conduct an "independent review of the record . . . to determine whether the state court  
16 clearly erred in its application of controlling federal law." Delgado v. Lewis, 223 F.3d 976, 982  
17 (9th Cir. 2000). Upon review of the record, it is clear that the state court denial of petitioner's  
18 claim was objectively reasonable. See Williams, 529 U.S. at 409.

19           The test for demonstrating ineffective assistance of counsel is set forth in  
20 Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must show that, considering  
21 all the circumstances, counsel's performance fell below an objective standard of reasonableness.  
22 Strickland, 466 U.S. at 688. To this end, the petitioner must identify the acts or omissions that  
23 are alleged not to have been the result of reasonable professional judgment. Id. at 690. The  
24 federal court must then determine whether in light of all the circumstances, the identified acts or  
25 omissions were outside the wide range of professional competent assistance. Id. "We strongly  
26 presume that counsel's conduct was within the wide range of reasonable assistance, and that he

exercised acceptable professional judgment in all significant decisions made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990)(citing Strickland, 466 U.S. at 689).

Second, a petitioner must affirmatively prove prejudice. Strickland, 466 U.S. at 693. Prejudice is found where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” Id. In extraordinary cases, ineffective assistance of counsel claims are evaluated based on a fundamental fairness standard. Williams v. Taylor, 529 U.S. 362 (2000), (citing Lockhart v. Fretwell, 506 U.S. 364 (1993)).

On October 3, 1986, police investigators interviewed Ms. Michel. At that time, they showed her a photo lineup from which she identified petitioner with “99 percent” certainty. (RT 5486.) On March 13, 1987, prior to the preliminary hearing in this case, investigators returned to Ms. Michel and showed her two additional photographic lineups. In the first lineup array of six photographs shown at that time, Ms. Michel once again identified petitioner. (RT 6178-6179.) While viewing a second set of photographs, Ms. Michel identified a photograph of Steven Claude Rockingham or Thomas Rideau<sup>6</sup> and told the police investigator, Sgt. Steven Knief, that “there was a resemblance” in the person in this photograph. (RT 5869, 6179.) She also stated that, “she thought [this person] had a slight resemblance to [petitioner] but it was not him.” (Id.) During this examination of the second set of photographs, investigators removed a photograph of Mr. Reece and asked Ms. Michel if she recognized him. (RT 4964, 5869.) Ms. Michel replied with certainty that she did not. (RT 5869.)

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<sup>6</sup> Petitioner states in his petition that the person identified by Ms. Michel during this second lineup was Mr. Steven Claude Rickingham or Rockingham. (Pet’r’s Mem. of Points and Authorities 20, filed June 4, 1998 [hereinafter “Pet’r’s Mem.”].) This statement is consistent with the testimony of Sgt. Knief, who identified the photograph during the preliminary hearing. However, the testimony at trial identified the man as Thomas Rideau.

Petitioner makes two allegations of ineffectiveness stemming from his trial counsel's failure to cross examine Ms. Michel with her prior statement in order to attempt to impeach her testimony.<sup>7</sup> (Pet'r's Supplemental Mem. at 27 [hereinafter "Pet'r's Supp."].) In the first instance, petitioner argues that his trial counsel erred when he failed to cross-examine Ms. Michel with statements she made during the lineup conducted on March 12, 1987. The second charge of ineffectiveness results from petitioner's trial counsel's failure to cross-examine Ms. Michel with statements made by her at the preliminary hearing about the March 12, 1987 lineup. In both instances, petitioner has failed to demonstrate that the level of his representation fell below a reasonably competent standard. Denial of petitioner's first claim is recommended as his counsel's actions were neither contrary to, nor an unreasonable application of clearly established Federal law.

1. Failure to Impeach with Statements Made to Sgt. Knief

According to petitioner, his trial counsel erred when he failed to impeach Ms. Michel with a statement that she made to investigators on March 13, 1997. (Pet'r's Mem. at 19.) Petitioner asserts that Ms. Michel identified someone else during this lineup as the person who murdered her husband. Petitioner argues that failure to effectively cross-examine on this issue resulted in prejudice to him. Petitioner's claim is without merit.

Petitioner makes no credible showing that his counsel's failure to impeach Ms. Michel with any statement made during the March 13, 1987 lineup was objectively unreasonable.<sup>8</sup> Indeed, the facts indicate that there is no apparent basis for any impeachment

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<sup>7</sup> Prior inconsistent statements are admissible as impeachment evidence under CAL. EVID. CODE § 780(h) and, when the witness has an opportunity to explain or deny the inconsistency, as substantive evidence under § 1235. As noted by the trial judge in his instructions, prior inconsistent statements may be considered by the jury in assessing the believability of a witness, (RT 7181), and as evidence of the truth of the facts stated previously (RT 7180-7181).

<sup>8</sup> Petitioner cites to the Reporter's Transcript to support his claims. These citations are in error and should be made to the Clerk's Transcript. For instance, petitioner claims that Sgt. Knief showed Ms. Michel a photo lineup on March 13, 1997, citing to page 147 in the Reporter's

1 based upon Ms. Michel's statements during the interview. At no point during either lineup  
2 shown to her on that day did Ms. Michel identify anyone other than petitioner as the man she  
3 witnessed murder her husband. As testified to by Sgt. Knief, upon being shown the initial lineup  
4 containing petitioner's photograph Ms. Michel immediately pointed to petitioner and identified  
5 him as the murderer. (RT 145, 6178-6179.) This fact was elicited during both direct  
6 examination by the prosecutor and cross-examination by trial counsel. When shown the second  
7 photo array, petitioner pointed to someone, but qualified her identification by saying that while  
8 that man resembled petitioner, it is "not him." (RT 147, 6179.)

9 Trial counsel had many reasons for not attempting to impeach Ms. Michel with  
10 these statements. The most important is that there is nothing contradictory about Ms. Michel's  
11 prior statements to suggest any problems with her recollection of events. Ms. Michel recognized  
12 petitioner from the first lineup. She did not identify him in the second lineup. Counsel cannot be  
13 criticized for refusing to raise a meritless issue wholly unsupported by the facts. See United  
14 States v. Shah, 878 F.2d 1156, 1162 (9th Cir. 1989)(failing to raise a meritless legal argument is  
15 not ineffective assistance of counsel), cert. denied, 493 U.S. 869 (1989).

16 Notwithstanding the obvious lack of any inconsistency in Ms. Michel's statements  
17 to investigators on March 13, 1987, trial counsel's decision to avoid asking questions about this  
18 later lineup was also a valid strategic decision. Ms. Michel's answers to Sgt. Knief only  
19 reconfirm that she was confident about her identification of petitioner as she would not waiver  
20 from that opinion at a later time. The comments made by Ms. Michel during the interview show  
21 that she was able to draw subtle distinctions between the individuals shown in the second set of  
22 photos and petitioner. Cross-examination on this matter would also permit the prosecution to  
23 place a greater emphasis on Ms. Michel's prior consistent statements, such as those given to  
24 police immediately after the murder describing a man resembling petitioner, (RT 5482-5483), as  
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26 Transcript. (Pet'r's Supp. at 27.) However, page 147 details only scheduling matters.



well as identifications made at the October 3, 1986 lineup, (CT 11, 18-19, 145, RT 5484-5487).  
See CAL. EVID. CODE § 1236. This strategic decision to avoid the prior statement is further  
justified if, in defense counsel's opinion, the individual shown from the second array does in fact  
resemble petitioner.<sup>9</sup> Petitioner's trial counsel stated as much in his closing argument, noting  
that the individual identified in the second lineup had a "slight resemblance." (RT 6971.)

2. Failure to Impeach with Statement Made at Preliminary Hearing.

Ms. Michel made additional statements about the March 13, 1987 lineup during  
the preliminary hearing. Petitioner argues that trial counsel erred when he failed to cross-  
examine Ms. Michel about these statements at trial. (Pet'r's Supp. at 27-28.) According to  
petitioner, cross-examination of Ms. Michel about these statements would have rendered her  
identification fundamentally unreliable. The facts do not support petitioner's claim.

As with his claim above, petitioner misrepresents what actually occurred at the  
preliminary hearing in order to serve his conclusions. With one exception, Ms. Michel's  
preliminary hearing testimony appears to be consistent with what actually occurred on March 13,  
1987. Where an inconsistency is present, trial counsel's failure to cross-examine on that single  
issue did not result in error.

At the preliminary hearing, trial counsel asked Ms. Michel about the two sets of  
photographs that she examined on March 13, 1987. As a result of those questions, the following  
exchange took place:

Ms. Ferguson: . . . Now, showing you Defendant's B [the second  
set of photos], I would like to ask that you show me in this lineup  
the person that you told Officer Wagner was the person that had  
shot your husband. Can you point to the picture you picked out the  
second time?

The Court: Picture on the left side.

Ms. Ferguson: Left side, the second.

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<sup>9</sup> The record contains neither Mr. Saffold's nor Mr. Rockingham's photographs.

1 The Court: It's the middle photograph on the left side. Second  
2 down from the top.

3 (Clerk's Transcript on Appeal (hereinafter "CT" 58.) The trial court stated that "it was pretty  
4 clear to me, the witness indicated she was identifying the perpetrator." (CT 69.) However, the  
5 statements in their proper context do not support such a finding by the court, nor do they lead to  
6 the conclusion that petitioner's counsel erred by failing to raise the exchange during the trial.

7 There is legitimate confusion over what question Ms. Michel actually answered.  
8 As the transcript shows, Ms. Michel answered in the affirmative that she could pick out the  
9 person she identified. Trial counsel prefaced this question with a statement about the identity of  
10 the murderer, but did not ask Ms. Michel if the person she chose was actually the man who shot  
11 her husband. Given the fact that multiple interpretations exist about the true nature of the  
12 question and answer in this exchange, and that the actual answer given to the actual question  
13 asked does not support petitioner's conclusion of an inconsistency, trial counsel's failure to  
14 cross-examine Ms. Michel about her statement was not below an objective standard of  
15 reasonableness.

16 During a second series of questions at the preliminary hearing, petitioner claims  
17 that Ms. Michel contradicted herself by answering that her identification of the man in the second  
18 array was an error and that she wasn't able to pick anyone from the second lineup. (Pet'r's Supp.  
19 at 27.) This contradiction requires a belief that Ms. Michel affirmatively identified a man from  
20 the second array as the one who killed her husband. As shown above, this interpretation does not  
21 naturally flow from the questions asked. Furthermore, given the testimony of others present at  
22 the time Ms. Michel made her statements on March 13, 1987, it is apparent that she identified  
23 someone, but qualified her identification by definitively saying that the man in the photo was  
24 "not him." (RT 147, 6179.)

25 Petitioner also complains about the following exchange:

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1 Q: Now, in response to Ms. Ferguson's questions, you've  
2 described what you did when you saw the photo lineups. Do you  
recall that?

3 A: The first one yes. The second one I'm not sure.

4 Q: . . . I have pulled out the top right hand photo [from the first set  
5 of photos] which is identified in the back as Tony Eugene Saffold.  
¶ Now, you were also shown a second photographic lineup which  
6 has been identified here as Defendant's B. Are you saying that this  
defendant's photograph is someplace in these?

7 A: I'm not sure about these.

8 (CT 65.) Petitioner argues that this exchange demonstrates additional inconsistencies in Ms.  
9 Michel's identification that could have been used by his trial counsel to undermine her  
10 credibility. To reach this conclusion, one must conclude that Ms. Michel identified someone in  
11 the second set of photos as the man who shot her husband. As the transcript indicates, Ms.  
12 Michel stated that she was unsure whether petitioner was in the second set of photos.

13 Ms. Michel expressed no doubt about her identification of petitioner, but rather,  
14 indicated that she was unable to remember the specifics of the questions that had been put forth  
15 to her by petitioner's trial counsel or whether petitioner was in the second photo array. There is  
16 no indication of any apparent inconsistency upon which Ms. Michel might be cross-examined at  
17 trial. The failure to utilize this passage from the preliminary hearing in an attempt to impeach  
18 Ms. Michel was objectively reasonable.

19 In the instances cited above, even assuming the facts are as petitioner posits them,  
20 there is no contradiction sufficient to warrant effective impeachment given that Ms. Michel did  
21 not ever tell Sgt. Knief that the man from the second photo array was the man who shot her  
22 husband, nor did she ever state that petitioner's photograph was in the second array. The  
23 testimony showed that Ms. Michel clearly identified petitioner in the first lineup shown to her on  
24 March 13, 1987 (RT 6178), and that her reference to Mr. Rockingham or Mr. Rideau was simply  
25 because he bore some resemblance to petitioner, but that it was not him (RT 6179). Petitioner's  
26 claim that Ms. Michel's contradicted herself when she affirmatively answered that she viewed

1 both a single photograph and multiple photographs is also without merit given the fact that both  
 2 of these events occurred during the March 13, 1987 interview.

3           Petitioner cites numerous cases for the proposition that the failure to impeach a  
 4 witness's trial testimony with prior inconsistent statements is ineffective. See (Pet'r's Supp. at  
 5 24-27.) However, each of those cases involved an omission of dramatically inconsistent prior  
 6 statements.<sup>10</sup> See United States v. Tucker, 716 F.2d 576, 586 (9th Cir. 1983)(involving earlier  
 7 perjured inconsistent testimony); Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995)(involving a  
 8 witness who testified at trial that he had witnessed defendant stab prison guard, but who had  
 9 previously told investigators that he merely had heard defendant "or someone" stabbed prison  
 10 guard); Smith v. Wainwright, 799 F.2d 1442, 1443-1444 (11th Cir. 1986)(involving witness who  
 11 testified at trial that defendant was a principal actor in a murder, but who had earlier told  
 12 investigators that he had been the principal actor). Unlike the cited cases, Ms. Michel's  
 13 testimony raises few doubts about the truth of her trial testimony. Indeed, much of the prior  
 14 testimony, such as Ms. Michel's insistence that the man in the second photo array looks like  
 15 petitioner, but was not him, merely bolsters her credibility by reinforcing before the jury Ms.  
 16 Michel's confidence in her identification of the murderer. The lack of inconsistencies and the  
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18 \_\_\_\_\_  
 19           <sup>10</sup> Petitioner also cites to two additional cases that are not relevant to this claim. In  
 20 Steinkuhler v. Meschner, 176 F.3d 441 (8th Cir. 1999), the court found ineffective assistance of  
 21 counsel as a result of trial counsel's failure to cross-examine a witness about statements that he  
 22 made prior to trial. There was no evidence of any prior inconsistent statements. During the trial,  
 23 the unimpeached witness told his subordinate, who offered contradictory testimony, that he  
 24 routinely "forgot" evidence that was unfavorable to the prosecutor's case. This unimpeached  
 25 witness was the only witness to offer evidence rebutting the petitioner's defense of intoxication  
 26 and his testimony was in direct conflict with other testimony in the record. As the District Court  
 noted, this prior statement about convenient forgetfulness was enough for a "devastating" cross-  
 examination and should have been utilized by the trial counsel to destroy the unimpeached  
 witness's credibility.

In Tomlin v. Myers, 30 F.3d 1235 (9th Cir. 1994), the court found ineffective assistance  
 where defense counsel failed to challenge a lineup conducted outside counsel's presence. Given  
 petitioner's arguments, the court assumed this citation was meant to be made in his second claim  
 and was erroneously cited as legal authority in the first claim. The court considered this case in  
 its analysis of petitioner's second claim.

1 weakness of any uncertainty in the preliminary hearing testimony suggests trial counsel acted  
2 reasonably in the cross-examination of Ms. Michel.

3 In one instance, petitioner's recitation of the facts is accurate and his claim is not  
4 so easily dismissed. During an exchange with trial counsel, Ms. Michel gave the following  
5 testimony in which she appeared to identify someone else as the person who murdered her  
6 husband.

7 Q: Do you recall Sergeant Knief and myself coming out to see you  
8 at your house?

9 A: Yes.

10 Q: Okay. And we – do you recall us showing you specifically a  
11 photograph of a different man?

12 A: Yes.

13 Q: One photograph in particular, do you remember that?

14 A: Yes.

15 Q: And at that time, do you recall what we asked you about that  
16 person?

17 A: If it was the person.

18 Q: And was that the man or was that not the man?

19 A: Yes, it was.

20 Q: The single photograph, that Sergeant Knief and I showed you,  
21 remember we came to your house and showed a single  
22 photograph?

23 A: I don't remember.

24 (CT 65-66.) There is little doubt that Ms. Michel said that the person she identified in the second  
25 array was the perpetrator. This person was not petitioner, but rather, Mr. Reece, whose picture  
26 was removed from the second photographic array and individually shown to Ms. Michel. (RT  
4964, 5006, 5869.)

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1           However, finding that counsel's failure to cross-examine Ms. Michel on this one  
2 answer was below a standard of reasonable competence is not possible given the inconclusive  
3 nature of Ms. Michel's testimony when examined in its entirety. Ms. Michel's answer is one  
4 response to multiple questions by the prosecutor and defense counsel. In every other instance,  
5 Ms. Michel positively identified petitioner in the first set of photos and excluded him from the  
6 second set. Furthermore, the testimony was filtered through an interpreter. Given that this  
7 exchange ultimately ended in frustration, with Ms. Michel responding that she did not remember  
8 an incident about which she had previously given detailed answers, it cannot be considered  
9 unreasonable for defense counsel to have concluded that cross-examination was not warranted.

10           From the time she was first asked, Ms. Michel consistently identified petitioner as  
11 the person who shot her husband. Her identification at the March 13, 1987 lineup is confirmed  
12 by other witnesses who heard her comments. In light of the true facts surrounding the lineup, the  
13 apparent inconsistency is easily explained away as a result of Ms. Michel's emotional state, the  
14 difficulties of direct and cross-examination, her limited understanding of English, and the need to  
15 use a translator. Consequently, trial counsel's strategic decision to avoid cross-examination on  
16 this issue did not fall below an objective standard of reasonableness.

17           Furthermore, as it concerns each of the issues raised in this claim, defense counsel  
18 faced an obvious strategic choice with how aggressively they pursued cross-examination of Ms.  
19 Michel, a sympathetic widow and victim. Trial counsel acknowledge this strategic conundrum  
20 when he stated in his opening that he did not want to be accused of "bad mouthing Ms. Michel."  
21 (RT 4823.) During cross-examination, he apologetically reassured Ms. Michel that he did not  
22 wish to upset her and asked her to tell him if she needed a break or wished to compose herself.  
23 (RT 4951-4952, 4954.) He reiterated his concern with handling Ms. Michel appropriately during  
24 cross-examination in his closing argument. (RT 6975, 7002.)

25           To this end, petitioner's counsel effectively impeached Ms. Michel's credibility  
26 and her perception of events with other testimony. On cross-examination, Officer Dale Wagner

1 testified to numerous statements made by Ms. Michel that were inconsistent with her trial  
2 testimony, including the time she arrived at the restaurant on the morning of the murder (RT  
3 5487), the ethnicity of the first customer into the store (RT 5489), and the movements of  
4 petitioner in the store (id.). Officer Wagner also described several inconsistencies in Ms.  
5 Michel's multiple statements to investigators. Officer Mark Lujan testified that despite Ms.  
6 Michel's description of the clothes worn by petitioner during the murder, she was unable to  
7 identify any of the items seized from petitioner. (RT 5467.)

8           Trial counsel's approach to impeachment can often be viewed as a tactical  
9 decision. Reynoso v. Giurbino, 462 F.3d 1099, 1113 (9th Cir. 2006). Such decisions are not  
10 ineffective unless petitioner is able to "overcome the presumption that, under the circumstances,  
11 the challenged action [or lack of action] 'might be considered sound trial strategy.'" Strickland,  
12 466 U.S. at 689 (quoting Michel v. State of La., 350 U.S. 91, 101 (1955)). Given the fact that  
13 much of the evidence cited by petitioner may not even rise to the level of an inconsistent  
14 statement that impeaches Ms. Michel's testimony, it is clear that this presumption regarding  
15 strategy cannot be overcome.

16           Finally, even if the court were to assume trial counsel erred by failing to impeach  
17 Ms. Michel with her preliminary hearing testimony or any of the other allegedly inconsistent  
18 statements, petitioner can make no claim of prejudice. The evidence of petitioner's guilt was  
19 substantial. Mr. Reece testified that petitioner admitted to robbing the restaurant (RT 4983), and  
20 showed him a gun similar to that recovered from petitioner's home (RT 5013). The gun had  
21 three empty shell casings, noting that only one shell had been fired prior to the time petitioner  
22 entered the restaurant. (RT 4985-4986.) Immediately after showing the empty shells, petitioner  
23 told Mr. Reece that he had "just shot the guy in the face." An expert witness testified that he felt  
24 "very strongly" that the gun recovered from petitioner's home was "most likely" used in the  
25 murder. (RT 5673-5674.) The prior inconsistent statements of Ms. Carolyn Williams provide  
26 affirmative evidence that petitioner admitted to shooting Mr. Michel and robbing \$45.00 from

1 the El Mexicano Restaurant. (RT 5295-5299, 5899, 5900-5907.) In petitioner's wallet when he  
2 was arrested was \$44.00. (RT 5468.)

3           Petitioner's trial counsel argued during closing that the inconsistencies in Ms.  
4 Michel's identification of petitioner made her less than credible (RT 6947, "Ms. Michel said  
5 that's the man . . . But she could be mistaken," 7002-7005, 7055, 7083, "[I]f you have reasonable  
6 doubt about [Ms. Michel's identification of petitioner], your duty is to give [petitioner] the  
7 benefit of the doubt," 7091), and the factors that could lead to a misidentification of petitioner  
8 (RT 6966-6977). The verdict in this case makes it clear that the jury was not swayed by these  
9 inconsistencies and found Ms. Michel's testimony credible. There is no indication the result  
10 would have been any different had trial counsel introduced any of the above statements.

11           Petitioner submitted affidavits from jurors supporting his argument that had they  
12 been informed that Ms. Michel had identified someone else as the murderer prior to trial, the  
13 outcome of the case might have been different. (Pet'r's Mem. at App. A-1 through A-5.) These  
14 documents, although improper under Rule 606(b) of the Federal Rules of Evidence, are of no  
15 relevance to this case since they assume circumstances which the court has found did not happen.

16           Petitioner claims ineffective assistance based upon his trial counsel's failure to  
17 cross-examine a witness about non-existent inconsistencies in her testimony. Petitioner attempts  
18 to recast the history of the entire March 13, 1987 interview and the preliminary hearing. When  
19 examined in their true light, it is difficult to see many of the inconsistencies about which  
20 petitioner complains or any reasonable basis for impeaching Ms. Michel's testimony. Where an  
21 inconsistency in Ms. Michel's testimony is present, valid strategic considerations justified trial  
22 counsel's decision to avoid an attempt at impeachment. There are no objective shortcomings to  
23 trial counsel's use of the preliminary hearing testimony.

24           The court finds no merit to petitioner's claim of ineffective assistance stemming  
25 from any statements made at or about the March 13, 1987 lineup. Ms. Michel affirmatively  
26 identified petitioner during the lineup and did not offer any inconsistent statements to those



1 present at the time of this identification about others who may have committed the crime. This  
2 confidence in her identification continued through the preliminary hearing. Trial counsel's  
3 failure to impeach Ms. Michel with any statements made at the lineup or during the preliminary  
4 hearing was not in error. Petitioner's first claim should be denied as the state court's ruling was  
5 neither contrary to, nor an unreasonable application of Federal law.

6 B. Trial Counsel's Failure to Litigate a Motion to Suppress an Identification

7 Petitioner's second claim is that his trial counsel was ineffective when he failed to  
8 fully litigate a motion to exclude Ms. Michel's identification of petitioner. Petitioner argues that  
9 his trial counsel unreasonably abandoned a motion to exclude Ms. Michel's identification of  
10 petitioner as a result of being shown a single photo, ineffectively litigated a remaining motion  
11 regarding the procedures used during the photographic lineup, and failed to renew the motion  
12 when necessary. As trial counsel's actions were objectively reasonable and did not deny him a  
13 fair trial, denial of petitioner's second claim is recommended.

14 The only reasoned rejection of this claim is the decision on petitioner's collateral  
15 appeal by the Superior Court of California, County of San Joaquin. The Superior Court rejected  
16 this claim on the ground that:

17 Petitioner contends he received ineffective assistance of counsel  
18 because his attorney was not prepare to argue a pretrial motion to  
19 exclude identification evidence and because his attorneys failed to  
20 adequately litigate the identification testimony. The Court has  
21 reviewed the transcript of the hearing on the motion to exclude  
22 identification evidence and finds that the delay in the motion was  
23 due to the failure of the prosecution to produce the original photo  
24 line-up. Petitioner's attorney demonstrated a high degree of  
competence by preserving motion options until the original photo  
line-up would be available and could be examined. There is no  
indication that the motion to exclude identification evidence was  
compromised or that petitioner was deprived of a potentially  
meritorious defense. Further there is no evidence that petitioner's  
counsel failed in any other manner to adequately litigate  
identification issues.

25 (People v. Saffold, Case No. SC 40118A, at 2-3.)

26 /////

1           The test for demonstrating ineffective assistance of counsel is set forth in  
2 Strickland, 466 U.S. at 668. As detailed above, Ms. Michel was shown a lineup on March 13,  
3 1987. At that lineup, Ms. Michel examined two sets of photographs. In the first set, Ms. Michel  
4 chose petitioner from the six photographs present. In the second set, Ms. Michel chose a man  
5 who resembled petitioner, but stated that it was “not him.” At that time, investigators removed a  
6 single picture from the second set and showed it to Ms. Michel, asking her if she recognized the  
7 man in the photograph. Ms. Michel replied that she did not and stated that the man pictured in  
8 the photograph was not in her restaurant on the morning of the murder.

9           Trial counsel filed a motion to exclude Ms. Michel’s identification of petitioner.  
10 (CT 521-530.) This motion sought to exclude Ms. Michel’s identification of petitioner based  
11 upon multiple violations, including the unduly suggestive nature of the lineups shown to Ms.  
12 Michel as well as a violation of United States v. Simmons, 390 U.S. 377 (1968). Petitioner  
13 argued that Ms. Michel expressed uncertainty when she identified petitioner and her selection  
14 was influenced by the actions and statements of investigators. (CT 526-528.)

15           Petitioner asserts that law enforcement presented Ms. Michel with a single  
16 photograph of him on March 13, 1997. (Pet’r’s Mem. at 37, 40; Pet’r’s Supp. at 16.) Petitioner  
17 appears to base this claim on the facts presented in his original motion to suppress Ms. Michel’s  
18 identification filed in the Superior Court prior to trial on June 5, 1989. (Compare Pet’r’s Supp. at  
19 13 with Pet’r’s Mem. at App. C.) In both filings, petitioner claims that Ms. Michel was shown a  
20 single photograph of him. (Id.) However, as petitioner’s counsel conceded at trial, and as  
21 documented by the evidence in the record, this assertion is not true.

22           There is no question that police investigators showed Ms. Michel a single  
23 photograph during their interview with her on March 13, 1987. There is also no question that  
24 that photograph was not of petitioner. Ms. Michel testified that police showed her a single  
25 photograph of Mr. Reece on March 13, 1987. (RT 4964.) Mr. Reece later identified himself as  
26 the person in the single photograph that police showed Ms. Michel. (RT 5006.) Sergeant Knief

1 stated that the photograph shown Ms. Michel on March 13, 1987, was a photograph of Mr.  
2 Reece. (RT 5869.)

3           During the preliminary hearing regarding the motion to exclude Ms. Michel's  
4 identification of petitioner, trial counsel conceded that a single picture of petitioner had not been  
5 shown to Ms. Michel. (RT 159.) Defense counsel accepted the prosecutor's representation that  
6 the single photograph shown to Ms. Michel during police questioning was not a photograph of  
7 petitioner. (*Id.*) As a result, trial counsel specifically stated that they were not proceeding with  
8 the aspects of their motion that sought exclusion of an identification by Ms. Michel based upon  
9 being shown a single photograph of petitioner. (*Id.*) Trial counsel acknowledged the facts as  
10 they actually were when they stated in their opening argument, "[the police] picked [Rodney  
11 Reece's] picture up and said, look, how about this guy, have you ever seen him before?" (RT  
12 4827.)

13           Given the utter lack of evidence to support petitioner's claim, it is difficult to  
14 conceive how counsel may have been ineffective on this issue. There was no objective evidence  
15 at any point during the trial to support any motion to exclude Ms. Michel's identification of  
16 petitioner based upon being shown a single photograph of him by law enforcement.  
17 Consequently, there is no merit at this time to any claim that trial counsel was ineffective for  
18 failing to bring or for continuing to argue such a motion. *See Shah*, 878 F.2d at 1162.

19           After properly withdrawing the part of their motion based upon the single  
20 photograph, trial counsel's remaining argument on the pending motion centered upon the  
21 multiple photograph lineup that was shown on March 13, 1987, and whether it was unduly  
22 suggestive. (RT 159-185.) Defense counsel continued by seeking exclusion of Ms. Michel's  
23 pretrial identification because the lineup of multiple photos presented to her was "unduly  
24 suggestive." (RT 183.) According to trial counsel, Ms. Michel was uncertain in her original  
25 identification of petitioner and only reached her conclusions when prodded by investigators. (CT  
26 526-527.) Due to the fact that the original photographic lineup was unavailable, and may have

1 been lost in the three years between its use and trial, the trial judge permitted defense counsel to  
2 raise any motions that may have been warranted upon discovery of the original. (RT 184.)

3           Petitioner's claim of ineffectiveness with regard to this issue is without merit.  
4 Trial counsel had little legal basis upon which to argue that the lineup procedure was unduly  
5 suggestive. Due process requires identification free from impermissible suggestion by law  
6 enforcement. United States v. Love, 746 F.2d 477, 478 (9th Cir. 1984). The Constitution  
7 prohibits only unnecessary or impermissibly suggestive pretrial identifications. Neil, 409 U.S. at  
8 196. Nothing in the record suggests any substantial likelihood of misidentification. Brathwaite,  
9 432 U.S. at 114-116. "An identification procedure is suggestive when it 'emphasize[s] the focus  
10 upon a single individual' thereby increasing the likelihood of misidentification." United States v.  
11 Montgomery, 150 F.3d 983, 992 (9th Cir. 1998).

12           However, nothing in the record details any unduly suggestive actions by law  
13 enforcement that may have tainted Ms. Michel identification of petitioner. Ms. Michel gave no  
14 testimony that would indicate that she felt pressured to make an identification. Officer Wagner  
15 described how he left Ms. Michel alone to examine the photographs, and that after "10, 20  
16 seconds, possibly a little longer . . . [Ms. Michel] walked over to where [he] had sat down" and  
17 identified petitioner. (RT 5484-5485.) As explained above, the failure to bring a meritless  
18 motion is not ineffective assistance of counsel.

19           Furthermore, the evidence consistently demonstrates that Ms. Michel was  
20 confident in her selection of petitioner from the photo lineups presented to her. While Sgt. Mark  
21 Lujan described Ms. Michel's identification of petitioner as tentative (CT 13), he also stated that  
22 she identified no other possible suspects from the original lineup presented to her (CT 20).  
23 Furthermore, Sgt. Lujan was confident enough in Ms. Wagner's selection of petitioner to arrest  
24 him on an outstanding warrant. (CT 13). Officer Wagner considered the identification made  
25 during the initial lineup on October 3, 1987, as "positive" (CT 153), and testified at trial that Ms.  
26 Michel was "almost positive" with her identification of petitioner (RT 5487). Sergeant Knief

1 stated that Ms. Michel identified petitioner on March 13, 1987, without any hesitation. (CT 145,  
2 RT 6178).

3           There is a similar lack of merit to petitioner's claim that the lineup procedures  
4 were unduly suggestive and should have precluded an in-court identification of petitioner by Ms.  
5 Michel. (CT 530.) In determining the validity of an in-court identification, the totality of the  
6 circumstances must be examined. Simmons v. United States, 390 U.S. 377, 384 (1968). Several  
7 factors, including the opportunity of the witness to view the criminal at the time of the crime, the  
8 witness' degree of attention, the accuracy of the witness' prior description of the criminal, the  
9 level of certainty demonstrated by the witness at the confrontation, and the length of time  
10 between the crime and the confrontation should be considered in assessing the reliability of the  
11 witness' identification and whether the confrontation leading to the identification was  
12 impermissibly or unduly suggestive. Neil v. Biggers, 409 U.S. 188, 196 (1972). These factors  
13 clearly demonstrate that Ms. Michel's identification of petitioner was valid and free of taint.

14           Ms. Michel identified petitioner as the man who shot and killed her husband. (RT  
15 4853, 4871, 4897, 4966.) This identification was based on numerous factors, including Ms.  
16 Michel's opportunity to view petitioner at the time of the murder. Ms. Michel saw petitioner  
17 when he entered the store (RT 4882), as he walked to the beer cooler (id.), when he was at the  
18 counter (RT 4883, 4887), when he made his demand for money (id.), when he pointed the gun at  
19 her husband (RT 4888), when he shot her husband (RT 4890), when he pointed a gun at Ms.  
20 Michel (RT 4967), and when he ordered her to open the cash register, and when she gave him the  
21 money that was in it (RT 4893). See Gray v Klauser, 282 F.3d 633 (9th Cir. 2002), reversed and  
22 remanded on other grounds, (upholding identification by witness that "had a good opportunity to  
23 view [the defendant]," was paying a relatively high degree of attention, accurately described most  
24 of the physical characteristic of the defendant, and was fairly sure at the photo lineup three days  
25 after the incident.) Upon evaluation of these factors, trial counsel's decision to not embark on a  
26 quixotic attempt to litigate this meritless claim was not in error.

1 Furthermore, nothing in the record supports petitioner's claim that his counsel was  
 2 ineffective for failing to take the trial judge up on his offer to reintroduce his motion if the facts  
 3 warranted. Petitioner claims his counsel was ill-prepared to argue the motion to exclude Ms.  
 4 Michel's identification. This claim may very well be true had the circumstances been as  
 5 petitioner asserts. However, the record shows changes in assumed facts and the available  
 6 evidence that affected trial counsel's ability to argue the entire motion as it was originally  
 7 presented. (RT 159, 185.) As noted by the Superior Court, petitioner's counsel effectively  
 8 preserved this motion should additional facts arise. As demonstrated above, no such facts that  
 9 would support a valid motion to exclude Ms. Michel's identification presented themselves.

10 No other issues with the identification appear in the record. Petitioner asserts in  
 11 his statement of facts that a Simmons<sup>11</sup> violation occurred and insinuates that trial counsel erred  
 12 by failing to more effectively challenge this aspect of the original motion. (Pet'r's Supp. at 14.)  
 13 However, this too appears to be a restatement of the facts contained in petitioner's original  
 14 petition (see Pet'r's Mem. at App. C), as petitioner's argument is devoid of any discussion of the  
 15 merits of this claim.

16 This claim ignores the fact that the trial court specifically ruled that petitioner had  
 17 failed to meet his burden as it concerned the identification procedure used by law enforcement  
 18 prior to the March 13, 1987 lineup. (RT 185.) This ruling is not an unreasonable application of  
 19 established Supreme Court precedent. Officer Wagner described advising Ms. Michel per  
 20 Simmons prior to the October 3, 1986 lineup. (CT 152, RT 5484.) Sergeant Knief testified that  
 21 he provided Ms. Michel with the Simmons admonishment prior to conducting the March 13,  
 22 1987 lineup. (CT 144, RT 5869.) Ms. Michel makes no mention of Simmons in her testimony.

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25 <sup>11</sup> Simmons v. United States, 390 U.S. 377, 384 (1968), governs suggestive lineups and  
 26 requires law enforcement to notify witnesses that the suspect, or his photograph, may or may not  
 be in the lineup.

1           There was no impermissible or suggestive pre-trial identification and there were  
2 adequate and independent grounds to ensure the reliability of Ms. Michel's identification of  
3 petitioner as the man who shot and killed her husband and robbed their restaurant. Petitioner did  
4 not suffer the ineffective assistance of counsel which he claims entitles him to relief in this case.  
5 The state court's rejection of petitioner second claim was neither contrary to, nor an unreasonable  
6 application of Federal law. Petitioner's second claim for relief should be denied.

7           For the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's  
8 application for a writ of habeas corpus be denied.

9           These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days  
11 after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
14 shall be served and filed within ten days after service of the objections. The parties are advised  
15 that failure to file objections within the specified time may waive the right to appeal the District  
16 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: January 9, 2007.

18  
19   
20 UNITED STATES MAGISTRATE JUDGE